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IN THE

Supreme Court of the United States

October Term, 1955

No. 495

DOUGLAS SCOTT THROPP,
Petitioner,

v.

HENRY W. FARNUM, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, and the appellant below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on May 26, 1955 (R. 65).

OPINIONS BELOW

The United States District Court for the District of Columbia on May 18, 1954, filed a "Memorandum of Court" (R. 48), and on June 30, 1954, filed Findings of Fact and Conclusions of Law (R. 49, 52), and also entered judgment on June 30, 1954. (R. 52) The opinion of the United States Court of Appeals for the District

of Columbia is set forth on pages 58 to 64 of the record and is reported in 223 F. 2d 640.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 26, 1955, (R. 65). The petition for rehearing was denied on July 1, 1955. (R. 71) The time for filing of this petition for certiorari was extended to and including October 29, 1955, by Chief Justice Earl Warren on September 26, 1955. (App. 8A) The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1) and Rule 19 of the Rules of this Court.

QUESTIONS PRESENTED

1. Were proceedings in the courts below void and beyond the jurisdiction of said courts because persons who were indispensable parties were not parties to the litigation?

2. Were indispensable parties omitted as parties to the litigation because of the negligence or deliberate actions of officers of the court (i. e., the committee or guardian *ad litem*)?

3. Did the court below err in basing its decision upon the concept of partial intestacy if a different result were arrived at?

4. Did the court below err in construing the will of Miriam D. Thropp?

STATUTES AND REGULATIONS INVOLVED

No statutes or regulations are specifically involved in this case.

STATEMENT OF THE CASE

The will of Miriam D. Thropp, deceased, was admitted to probate in the District of Columbia after her death in October, 1930. The will provides, *inter alia*, for certain payments of income to her children, Douglas Scott Thropp, Thomas Alexander Scott Thropp,* and Anna Scott Farnum, in specified shares, and for ultimate distribution of the principal to them or their children. (R. 16-32) After the death in 1940 of Anna Scott Farnum, a petition was filed on August 15, 1950, in the United States District Court for the District of Columbia (R. 3-32) for a determination of the disposition to be made of the income that had been payable to Anna Scott Farnum during her life.

The will of Miriam D. Thropp is set forth in full in the Appendix for Appellant filed in the court below and made a part of the record herein. (R. 16-32).

The District Court held that the disputed income which had been held undistributed by the trustee since the death of Anna Scott Farnum, together with the sum of Six Thousand Seven Hundred and Seven Dollars and Eighty Cents ($6,707.80), which the Fidelity-Philadelphia Trust Company agreed to pay, by way of compromise of a counterclaim of your Petitioner, as interest on the undistributed income, should be paid to her issue. (R. 48-53) This holding was affirmed on appeal to the United States Court of Appeals for the District of Columbia Circuit, (R. 58-64) and Douglas Scott Thropp brings this petition for certiorari. Miriam D. Utgoff has authorized Petitioner to speak for her and her children in this petition.

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* Thomas Alexander Scott Thropp has changed his name, by legal action in 1932, to Thomas Alexander Scott; consequently, he will hereinafter be referred to as Thomas A. Scott.

In the courts below, all of the grandchildren of Anna Scott Farnum were made parties and designated as beneficiaries under the Will. (R. 2-3). None of the grandchildren of Thomas A. Scott were made parties, nor were any of the grandchildren of your Petitioner originally made parties in spite of the fact that they, obviously, have the same status under the will as the grandchildren of Anna Scott Farnum; however, the District Court ordered (Tr. 57)** that a guardian *ad litem* for the grandson of your Petitioner, Alexander Carter Thropp, be appointed. This appointment was strenuously resisted by Roy B. Kelly, the committee for Thomas A. Scott.

One, Karl J. Hardy (then a partner in a law firm with Roy B. Kelly), originally filed this action in the District Court as the committee of the person of Thomas A. Scott (R. 3-32), designating himself, in said capacity, as plaintiff, and his petition was signed by one Roy B. Kelly as attorney for plaintiff (R. 15). It appears that Karl J. Hardy died thirteen (13) days after filing said petition, and Roy B. Kelly was substituted by the Maryland court as the committee of the estate of Thomas A. Scott (Tr. 3). The record discloses that at the time that Roy B. Kelly became substitute committee, one F. Elwood Davis (another partner in a law firm with Roy B. Kelly), signed the motion for substitution, as attorney for Roy B. Kelly, substitute committee for the estate of Thomas A. Scott, Incompetent. (App. 10A).

The record also discloses that on November 16, 1951, said F. Elwood Davis, as attorney for plaintiff, (Roy B. Kelly), filed an "Affidavit for Entry of Default by Clerk" (App. 10A-11A), asking that the court default Douglas Scott Thropp, Jr., Wilmer Scott, Miriam D. Utgoff, Miriam Scott Thropp and Douglas Scott Thropp.

** Tr. refers to the transcript from the District Court.

Upon said affidavit, the Clerk of the United States District Court entered the default required thereby on November 16, 1951. (Tr. 43). Douglas Scott Thropp, Jr., and Miriam Scott Thropp, early in 1953, succeeded in having their respective defaults set aside over the objections of Cary McN. Euwer, Esquire, as attorney for plaintiff (Roy B. Kelly). (Tr. 51-52) No opposition was made when your Petitioner sought to have his default set aside. The defaults against Wilmer Scott and Miriam D. Utgoff were never set aside.

The record also discloses that said Cary McN. Euwer succeeded the said F. Elwood Davis as attorney for Roy B. Kelly, and that, on July 23, 1953, Mr. Euwer, as attorney for Mr. Kelly, filed points and authorities in opposition to the appointment of a guardian *ad litem* for Alexander Carter Thropp, a grandson of your petitioner, Douglas Scott Thropp; (App. 12A) however, in spite of this opposition, the District Court, on August 17, 1953, entered an order appointing a guardian *ad litem* for Alexander Carter Thropp. (Tr. 57). It thus appears that Mr. Kelly, through his attorney, opposed the appointment of a guardian *ad litem* for the Thropp grandchildren in spite of the fact that he had, in his original petition, made all of the Farnum grandchildren parties to the litigation. It would seem that, in spite of his opposition to such appointments, when the court had indicated that a guardian *ad litem* would be appointed for one of the Scott grandchildren, Mr. Kelly should have informed the court that his ward also had several grandchildren, to-wit, the children of Wilmer Scott and Miriam D. Utgoff; however, this was not done, and it does not appear that the court was ever advised of the existence of these additional Scott grandchildren and, consequently, said grandchildren were never before the court, and it is the contention of your petitioner that these grandchildren were indispensable parties to the litigation involved herein.

The record discloses that the possibility that the disputed income would pass by intestacy was raised in both the District Court and the Court of Appeals; in fact, the decision of the Court of Appeals stated,

> "If the one-fifth income in question is not to be paid to Anna's issue the will bequeaths it neither to the sons nor to anyone else and partial intestacy arises." (R. 63).

While the Petitioner contends that this holding of the court below is error, it appears that, since such a consideration was before both of the courts below, the heirs at law were also indispensable parties to the litigation. The heirs at law, in addition to the beneficiaries under the will, were the three children of Helen Bickley Page and their issue. (R. 67) Although Helen Bickley Page was expressly disinherited by Item Ninth of her mother's Will, that fact does not make her or her issue any less indispensable parties to a suit for construction of said Will where one of the problems involved is whether or not a portion of the estate, or the income therefrom, would pass by intestacy.

It is the contention of your Petitioner that the decision of the District Court, as affirmed by the Court of Appeals, is mathematically and humanly impossible of implementation. This contention is hereinafter fully established.

ARGUMENT

I. The Proceedings In the Courts Below Were Void and Beyond the Jurisdiction of Said Courts Because Persons Who Were Indispensable Parties Were Not Before Either of the Courts

A Federal court is without jurisdiction to adjudicate a controversy where indispensable parties are not brought before the court. *Shields, et al* v. *Barrow,* 58 U. S. 130,

17 How. 130, 15 L. Ed. 158. *U. S.* v. *Hellard* 64 S. Ct. 985, 322 U. S. 363, 88 L. Ed. 1326, reversing 138 F. 2d 985, rehearing denied 65 S. Ct. 27. *Franz* v. *Buder* 11 F. 2d 854, cert. den. 273 U. S. 756, 71 L. Ed. 876, 47 S. Ct. 459.

An "indispensable party" has been defined as one who has such an interest in the controversy or its subject matter that a final decree between the other parties cannot be made without seriously injuring his interest, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. *Jennings* v. *United States,* 264 F. 399, 404.

In the case of *Green* v. *Brophy,* 71 App. DC 299, 110 F. 2d, 539, 9 ALR 2d 1, the court said:

> "Indispensable parties have been defined by this court as 'All whose interests will be affected by the decree, that is, all persons materially interested either legally or beneficially in the subject matter of the suit. . . .' *Balter* v. *Ickes,* 67 App DC 112, 115, 89 F. 2d 856, 859; *Ducker* v. *Butler,* 70 App DC 103, 104 F. 2d 236; *Flynn* v. *Brooks,* 70 App DC 243, 105 F. 2d 766, decided May 22, 1939. Other judicial pronouncements have been to the same effect. See *Franz* v. *Buder,* 8 Cir. 11 F. 2d 854, 856, 857. It is important to note that whether a party is indispensable depends on something other than the effect of a decree as res adjudicata upon him. Of necessity that must be so, else absent parties would never be indispensable. The guiding principle, determining the indispensability of absent parties, was enunciated by the Supreme Court in *California* v. *Southern Pacific Company,* 157 U. S. 229, 255, 15 S. Ct. 591, 601, 39 L. Ed. 683, as follows: 'Irrespective . . . of the extent, technically speaking, of the effect and operation of a decree. . . . as res adjudicata, it is impossible to ignore the inquiry whether the interests of persons not before the court would be so affected, and the controversy so left open to future litigation, as would be inconsistent with equity and good conscience.'"

The authorities agree upon the proposition that all of the beneficiaries under a will are indispensable parties to a suit for the construction of the will. *Dallas Bank & Trust Co.* v. *Holloway et al.*, 50 F. 2d 197, 199. *Harper et al.* v. *Hudgings* (Mo. Sup.) 211 S. W. 63; *Loomis Institute* v. *Healy*, 98 Conn. 102, 119 A. 31; *Nunnelly et al.* v. *Nunnelly*, 173 Ky. 372, 191 S. W. 85; *Marx* v. *Hale*, 119 Miss. 410, 81 So. 119; *Brown* v. *Brown* (Supp.) 190 N. Y. S. 373; *Early* v. *Arnold*, 119 Va. 500, 89 S. E. 900. It certainly cannot be argued that the grandchildren of Thomas A. Scott were any less indispensable to the litigation in the courts below than were the grandchildren of his half-sister, Anna Scott Farnum; furthermore, in this case there was a specific ruling by the District Court in a "Memorandum of Court" (App. 13A-14A) that the appointment of a guardian *ad litem* for Alexander Carter Thropp was necessary. It thus appears that it was considered necessary by the court to appoint a guardian *ad litem* for one of the grandchildren of your petitioner and that this attitude of the court was communicated to all parties and that, nevertheless, no action was taken whatsoever to advise the court of the existence of grandchildren of your petitioner's brother, Thomas A. Scott.

It appears obvious that the grandchildren of Thomas A. Scott had "such an interest in the controversy or the subject matter of the controversy that a final decree between the other parties before the court cannot be made without seriously injuring their interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience." *Jennings* v. *United States*, supra.

The grandchildren of Thomas A. Scott are beneficiaries under the Will of Miriam D. Thropp (R. 16-32) and, as such, are indispensable parties to any suit for the construction of said Will, as shown by the authorities cited above. However, the grandchildren of Thomas A. Scott

were not parties to the litigation in either of the courts below and, in view of this fact, it is submitted that said courts acted in the absence of indispensable parties and, consequently, without jurisdiction.

Helen Bickley Page was a daughter of the testatrix who was expressly disinherited by Item Ninth of the Will. (R. 26) Although Helen Bickley Page is deceased, she has a son and two daughters, as well as several grandchildren, who survive. It is submitted that the issue of Helen Bickley Page are heirs at law of the testatrix and, as such, indispensable parties to any suit to construe the Will where the question of partial or complete intestacy is involved. The record discloses that this question was before the courts below; in fact, it appears that the Court of Appeals, in part at least, based its decision upon a determination of this question. That Court said:

> "If the one-fifth income in question is not to be paid to Anna's issue the will bequeaths it neither to the sons nor to anyone else and partial intestacy arises." (R. 63).

It thus appears obvious that, since the question of partial intestacy was *expressly* determined by the courts below, *all* of the heirs at law were indispensable parties and that the issue of Helen Bickley Page, as such heirs at law, were also indispensable parties to the litigation.

II. Indispensable Parties Were Omitted As Parties To the Litigation in the Courts Below Because of the Negligence or Deliberate Actions of Fiduciaries and Officers of the Court.

The record discloses that Roy B. Kelly was the substitute committee for Thomas A. Scott (Tr. 31) and, as such, it would be normal to expect Mr. Kelly to make every effort to protect the interests of his ward's children and grandchildren. One would normally expect such a committee to at least call attention to the existence of the

grandchildren of his ward when it developed that, over the objection of said committee, the District Court appointed a guardian *ad litem* for the grandson of your petitioner (Tr. 57) and, particularly, where the District Court, as here, actually issued a "Memorandum of Court" stating that the Court considered such appointment necessary. (App. 13A-14A). Mr. Kelly took no such action and it appears that, in both courts below, the courts were without any knowledge of the existence of the grandchildren of Thomas A. Scott. In fact, it is impossible for your petitioner to imagine how, in the instant case, his grandchildren could have any status different from the status of the grandchildren of Thomas A. Scott (petitioner's brother).

The foregoing indicates that not only were indispensable parties not present, but that there appears to be some indication of a deliberate attempt to avoid the presence of parties who might raise embarrassing or conflicting claims to the claims presented by the parties that were present. This indication comes from:

1. Roy B. Kelly was attorney for his law partner, Karl J. Hardy, when the original petition was filed herein and, as such, listed as parties all of the Farnum grandchildren but none of the Thropp grandchildren—not even those of his own ward! (R. 2-3).

2. The opposition of Roy B. Kelly, as Committee of Thomas A. Scott, to the efforts of Douglas Scott Thropp Jr., son of your petitioner, to have the default as to him set aside.

3. The aforementioned opposition of Roy B. Kelly, as Committee, to the appointment of a guardian *ad litem* for Alexander Carter Thropp, grandson of your petitioner. (App. 12A-13A).

4. The fact that, when S. Churchill Elmore was appointed as guardian *ad litem* for Alexander Carter

Thropp, Mr. Elmore, in his report, raised a question as to the propriety of Mr. Kelly's presence in the case as plaintiff under an appointment from a Maryland Court (Tr. 58) which resulted in Mr. Kelly's removal as a party and the substitution of his attorney, Cary McN. Euwer, as a guardian *ad litem* for Thomas A. Scott. (Tr. 64)

5. The failure of Mr. Cary McN. Euwer, as guardian *ad litem*, to call to the court's attention the existence of the grandchildren of Thomas A. Scott in spite of Mr. Euwer's personal knowledge of the "Memorandum of Court" issued on August 6, 1953. (App. 13A-14A).

III. The Court Below Erred In Basing Its Decision Upon the Concept of Partial Intestacy.

The concept of partial intestacy, which is so prominently set forth in the opinion of the Court below, actually has no place in this case. The Court below stated, as we have seen, that, if the disputed income is not paid to Anna's issue, the Will makes no provision for its disposition, and partial intestacy arises; however, this is obvious error. Actually, the Will directs that the trustee shall:

> "Upon the decease of any one of my said children to continue to pay the share of income to which the child so dying would be entitled if living, to his or her issue *until the time hereinafter fixed for the distribution of this trust.* (Emphasis supplied) (R. 20).

To ascertain the intention of the testatrix in her use of the term "the time hereinafter fixed for the distribution of this trust" we must look at all the provisions of the Will and the situation that existed, and was known to the testatrix, at the time that she made the Will. Paragraph f-5 of the Will is obviously intended to meet the limitations imposed upon such documents by the Rule Against Perpetuities and, equally obviously, is not de-

signed as a dispositive clause. To find the intention of the testatrix as to the action that should be taken upon the death of Anna Scott Farnum, we need only refer to Paragraph f-3 of the Will, (R. 21) which is clear and explicit and specifically provides that the children of Anna Scott Farnum shall receive "the balance of the principal of the residuary estate remaining after deducting from the whole principal the Three Hundred Thousand Dollars ($300,000) as hereinbefore provided." Furthermore, these two provisions of the Will should be read in conjunction with Item Seventh, which states;

> "SEVENTH: It has always been my intention and desire to reimburse my two sons, Douglas Scott Thropp and T. A. Scott Thropp on account of their having incumbered their remainder interests in the estate of their grandfather. Thomas A. Scott, by the creation of two separate bond issues secured thereby in the sum of One Hundred and Fifty Thousand Dollars ($150,000) each for the benefit of my husband Joseph E. Thropp. I have accordingly taken this fact into consideration in providing for my two sons and their issue as hereinbefore set forth." (R. 24)

It thus becomes obvious that the testatrix considered that she was obligated to repay her sons the sum of One Hundred and Fifty Thousand Dollars ($150,000) each that they had advanced to their father and, for this reason, she preferred these sons to the extent of One Hundred and Fifty Thousand Dollars ($150,000), each in the corpus of the trust established by the Will. This interpretation is further supported by the provision in Paragraph *e* of the Will that each of the sons shall receive two-fifths of the income of the trust and the daughter, one fifth thereof. (R. 19)

Since the testatrix intended to prefer her sons to the extent of One Hundred and Fifty Thousand Dollars ($150,000) each, she provided that the heirs or descendants of her daughter should receive income only from the por-

tion of the trust estate that exceeded the Three Hundred Thousand Dollars ($300,000), that she had allotted to the two sons. In view of this obvious intention can it be seriously questioned that she also intended to prefer the two sons as to the income from the Three Hundred Thousand Dollars ($300,000) set aside for their benefit? If this could be seriously considered, it appears that such contention would be completely disposed of by the aforementioned Paragraph *e* of the Will, which also prefers the sons as to the income. It thus appears that it was the intention of the testatrix that each of her sons should have a vested interest in the trust funds to the extent of the One Hundred and Fifty Thousand Dollars ($150,000) by which each was preferred. This is further evidenced by the testatrix' provision in the codicil executed the Twenty-seventh Day of June, 1929 (R. 31-32), that any debts of the sons owed to the testatrix at the time of her death should "be deducted from the principal of the trust created for them under my said Last Will and Testament." (R. 31) Consequently, since the fund itself was intended by the testatrix to be vested in her two sons to the extent of their preferment, the income to that extent would go to the sons as the holders of the vested interest.

It therefore appears that the court below erred in holding that partial intestacy would be involved if the disputed income were not paid to Anna's issue. Such income should be divided equally between your petitioner and his brother in accordance with the provisions of the Will aforementioned.

IV. The Court Below Erred In Construing the Will of Miriam D. Thropp.

The court below erred in holding that paragraph f-5 of the Will set the time for distribution of the disputed income. Paragraph f-5 was placed in the Will for the sole purpose of complying with the requirements of the

Rule Against Perpetuities. This appears obvious when we consider the age of the children and grandchildren of the testatrix at the date on which the Will was made, since f-5 very clearly would not affect any grandchild of the testatrix more than nine years old, as the provisions in f-1, f-2, or f-3 would have previously operated.

Testatrix executed the Will on July 2, 1927; at that time, her daughter Anna Scott Farnum was forty-nine (49) years old; your petitioner, Douglas Scott Thropp, was thirty-five (35) and Thomas A. Scott was thirty-four (34) years old. Thus, it appears that the testatrix knew that Anna was beyond the age of probably child-bearing—and, furthermore, Anna was and for ten years had been a widow. At the time that the testatrix executed the Will Anna's youngest child was more than twenty years old. Each of the two sons had a normal life expectancy, at the time, of more than thirty years. Adding this thirty-year normal life expectancy to the twenty-one year provision in f-5, would mean that, if the testatrix died immediately after execution of the Will, f-5 would be unlikely to become effective before fifty-one years.

Thus, if the testatrix assumed that *either* of her sons would live out a normal life expectancy, it must have been obvious to her that her grandchildren would all be more than thirty years old and take, at the death of their respective parents, under f-1, f-2, or f-3, many years before the time specified in f-5 could come into operation since the death of the respective parents would activate paragraph f-1, f-2, or f-3 in each case. In this connection it should be noted that f-5 cannot come into operation unless all three of her children are dead and that the waiting period of twenty-one years starts with the date of the death of the last of three children.

If the holding of the court below that "The above-quoted reference in clause (e) of Item Sixth to 'the time

hereinafter fixed for the distribution of the principal of this trust' was intended by testatrix as a reference to the time specified in clause f-5 for final distribution rather than one or more of the various earlier times of partial distribution." (R. 52) is correct, as applied to the issue of Anna, a ridiculous result is reached. Anna's youngest child was more than twenty years old when the Will was executed; therefore, if the testatrix and Anna had both died immediately after the execution of the Will, Anna's youngest child would have received her share of the estate under f-3 in ten years without waiting until twenty-one years after the survivor of her two thirty-five year old uncles died. Furthermore, can it be seriously contended that the testatrix meant that her grandchildren should wait for fifty-one * (51) years to receive the legacy that she was leaving to them? If so, it must be assumed that the testatrix intended that her grandchildren would not get their legacies until they were more than seventy years old—if they lived so long!

Even if we assume the fantastic premise that testatrix was sure she would expire immediately after signing her Will on July 2, 1927, and that all three of her children would immediately follow her in death, it would be July 1948 before any grandchild could take under f-5 of the Will. However, the youngest Farnum grandchild would have taken her share of the estate under f-3 of the Will, on February 25, 1937, when she became thirty years of age.

CONCLUSION

The courts below acted in the absence of indispensable parties, i. e., issue of Thomas A. Scott and Helen Bickley Page; furthermore, the record discloses some irregu-

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* The thirty-year life expectancy of the uncles plus the twenty-one-year time specified in f-5.

larities in the actions of fiduciaries and officers of the court in failing to call to the attention of the courts below the absence of indispensable parties. The court below erred in basing its decision upon the concept of partial intestacy since it was obviously the intention of the testatrix that her two sons should receive the income from the funds allocated to and vested in them. The court below erred in the construction of the Will, as the effect of the decision of the court below would be a mathematical and human impossibility.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

EARL J. LOMBARD
Attorney for Petitioner

October 1955.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,377

DOUGLAS SCOTT THROPP, APPELLANT

v.

HENRY W. FARNUM, ET AL., APPELLEES

No. 12,378

THOMAS A. SCOTT, APPELLANT

v.

HENRY W. FARNUM, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

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Decided May 26, 1955

Mr. Benj. W. Dulany for appellant in No. 12,377.

Mr. Cary McN. Euwer for appellant (incompetent) in No. 12,378.

Mr. John Holt Myers for appellees Henry W. Farnum, *et al.*, in both cases.

Mr. Arthur G. Lambert for infant appellees Edith B. Farnum, *et al.*, in both cases.

Messrs. Edward Bennett Williams and *Colman B. Stein* and *Miss Agnes A. Neill* entered appearances for appellee Fidelity-Philadelphia Trust Co. in both cases.

Mr. S. Churchill Elmore entered an appearance for infant appellee Alexander Carter Thropp in both cases.

Before BAZELON, FAHY and DANAHER, Circuit Judges.

FAHY, *Circuit Judge:* The will of Miriam D. Thropp, deceased, was admitted to probate in the District of Columbia after her death in October 1930.[1] It provides, *inter alia,* for certain payments of income to her children Douglas Scott Thropp, Thomas Alexander Scott Thropp[2] and Anna Scott Farnum, in specified shares, and for ultimate distribution of the principal to them or their children. After the death in 1940 of Anna Scott Farnum uncertainty arose regarding the proper disposition after her death of the portion of income payable to her during her life. On a petition for construction of the will the District Court held that the disputed income, which had been held undistributed by the trustee since Anna's death, should be paid to her issue. Douglas Scott Thropp and Thomas Alexander Scott appeal.

The particular portion of the will to be construed is paragraph Sixth. It devises and bequeaths to a trustee the residue of the estate for investment and collection of the income. After certain other directions the will provides that the balance of the net income of the residuary or trust estate shall be paid to the testatrix's children Douglas Scott Thropp, Thomas Alexander Scott and Anna Scott Farnum in the proportions of two-fifths to each son and one-fifth to the daughter, during their respective natural lives. The will then directs the trustee:

> "• • • Upon the decease of any one of my said children to continue to pay the share of income to

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[1] Two codicils were also admitted to probate but they are not relevant to this litigation.

[2] Thomas Alexander Scott Thropp has apparently discontinued use of the name Thropp.

> which the child so dying would be entitled if living, to his or her issue until the time hereinafter fixed for the distribution of the principal of this trust * * *."

None of the principal of the trust is to be distributed so long as the three named children of testatrix all live nor upon the death of any one of them unless one or more children of such deceased son or daughter shall then have attained the age of 30 years,

> "* * * provided, however, that upon the expiration of twenty-one years from the date of the death of the survivor of my said three children * * * this trust shall be finally terminated and the principal immediately divided and distributed among the then surviving issue of my said three children entitled thereto, in the proportions and to the extent hereinafter set forth."

The will then continues:

> "I direct that prior to the time for final distribution my residuary estate shall be partially distributed as follows:"

that is, upon the death of Douglas Scott Thropp any of his children who shall have attained the age of 30 years shall be entitled to receive a porportionate part of $150,000 of the principal of the trust, and thereafter as each child of said son attains the age of 30 years he or she shall be entitled to receive a proportionate part of $150,000 of said principal, share and share alike. A like proviso follows with respect to the death of the son Thomas Alexander Scott. However, upon the death of Anna Scott Farnum any of her children who shall have attained the age of 30 years shall be entitled to receive only a proportionate part of one-third of the balance of the principal of the residuary estate in excess of the $300,000 set aside for the children of testatrix's two sons as above outlined; and as each child of the said daughter attains the age of 30 years he or she shall thereupon become entitled to re-

ceive his or her share of one-third of said balance, share and share alike. The children of the two sons are granted participation in the remaining two-thirds of the balance of the principal in excess of $300,000.[3]

It is then again provided that at the expiration of twenty-one years from the death of the survivor of testatrix's three children the "trust shall be terminated, and the principal thereof then held by my Trustees shall be distributed, per stirpes", among any of the grandchildren then living who shall not have attained the age of 30 years and the living issue of any of the grandchildren who shall have died before attaining the age of 30 years, leaving issue, in proportions indicated.

When the daughter Anna Scott Farnum died in 1940 each of her three surviving children had attained the age of 30 years. They accordingly became entitled by the terms of the will to receive a share in that part of the principal of the trust which exceeded the $300,000 set aside for the issue of Anna's brothers Douglas Scott Thropp and Thomas Alexander Scott. But at Anna's

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[3] The reason for the larger share for the children of the two sons is indicated by paragraph Seventh of the will, where testatrix states that it had always been her intention and desire to reimburse them on account of their having encumbered their remainder interests in the estate of their grandfather by the creation of two separate bond issues secured thereby, in the sum of $150,000 each, for the benefit of testatrix's husband. Furthermore, other provisions of the will reflect her desire to put an end to all litigation among members of her family. We note, also, that the aggregate of sums mentioned in the will demonstrates that testatrix expected her estate substantially to exceed in value that which it retained. The trust estate was found by the court below to amount in May, 1940, to about $144,000 and in February, 1954, to about $200,000. The court also found that at no time since the death of testatrix had the principal reached $300,000 in value.

death the entire trust estate amounted to less than $300,000, so there was no principal available for distribution to her children.

The question is what disposition should be made of the one-fifth share of income payable to Anna during her life. As we have seen the will provides that after her death this income shall be paid to "her issue until the time hereinafter fixed for the distribution of the principal of this trust". Did the testatrix by this clause intend payment of the income to cease at the time fixed for partial distribution of principal to the children of her deceased daughter, even though no principal were actually available for distribution to them when that time arrived? Or, on the other hand, should her issue continue to receive the one-fifth share of income until the time for final distribution of the principal?[4] If the former Anna's issue receive none of the disputed income. If the latter it is to be divided among them.

The court below held that testatrix intended the phrase "time hereinafter fixed for the distribution of the principal" to mean the time for final, rather than partial, distribution, subject, as the court said, "to the contingency or contingencies that the residuary estate will be reduced by the payments" earlier made of principal under any of the provisions for partial distribution, as hereinabove outlined.

The actual intention of the testatrix is unclear. Counsel have ably presented and we have carefully considered the various factors, drawn from the general scheme as well as the particular provisions of the will, which support one or the other construction urged upon us; that

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[4] Since Anna has died, this will occur, under the terms of the will, not later than twenty-one years from the death of the survivor of Anna's two brothers who are the appellants.

is, whether the income should continue to be paid to the issue of a deceased child until final distribution or only until the respective times for partial distribution of principal, which in the case of Anna's issue was at her death. It is rather surprising that notwithstanding testatrix's efforts to cover with precision all possible contingencies the shrinkage in value of her estate caused a situation to exist at Anna's death which permitted then no partial distribution of principal to Anna's children. Clearly testatrix otherwise contemplated. Furthermore, she made no provision for payment of income to each of the two sons in excess of two-fifths. If the one-fifth income in question is not to be paid to Anna's issue the will bequeaths it neither to the sons nor to anyone else and partial intestacy arises. This too was not intended, nor is intestacy favored by the courts, especially where, as here, a will obviously seeks to dispose of the entire estate. See *Bunker* v. *Jones*, 86 U.S. App. D.C. 231, 234, 181 F. 2d 619, 622, and cases cited. *Hilton* v. *Kinsey*, 88 U.S. App. D.C. 14, 18, 185 F. 2d 885, 889; *Caine* v. *Payne*, 86 U.S. App. D.C. 404, 406, 182 F. 2d 246, 248, *cert. denied*, 340 U.S. 855, 20 A.L.R. 2d 823; 57 Am. Jur., Wills § 1158; 2 Page on Wills, § 926, p. 845. Applying the canon of construction which frowns upon intestacy we are led to resolve the question in accord with the view adopted by the District Court. Though not the only permissible one this construction is within the language of the will and is consistent with the general intent of the testatrix. It avoids partial intestacy, and it simply means that the percentage of income paid to Anna during her life is continued after her death for her issue, but the percentage will not apply to principal which from time to time is distributed; that is to say, at the several times when distribution of principal occurs the amount of the one-fifth income will be reduced by application there-

after of the percentage only to the principal remaining in the trust.

Under the special circumstances of this case we find no abuse of discretion in allowing fees for guardians ad litem or in directing their payment from the principal of the trust.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1955.

DOUGLASS SCOTT THROPP,
Petitioner

vs.

HENRY W. FARNUM, ET AL.

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner(x),

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 29th, 1955.

(SGD) EARL WARREN
Chief Justice of the United States.

Dated this 26th
day of September, 1955.

Filed Feb 1 1951 Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Karl J. Hardy, Committee of the Person of Thomas A. Scott
Plaintiff

vs.

Fidelity-Philadelphia Trust Company, et al
Defendants

No. 3541-50

Motion for a Substitution of Plaintiff

Now comes Roy B. Kelly, Substitute Committee of the Estate of Thomas A. Scott, Incompetent, and suggests

to the Court the death on August 28, 1950, of Karl J. Hardy, Esq., former Committee of the person and estate of said Thomas A. Scott, Incompetent, and the plaintiff in this action; and further shows that on the 25th day of October, 1950, the said Roy B. Kelly was appointed Committee of the Estate of Thomas A. Scott by the Circuit Court for Baltimore County, Maryland, and that he has duly qualified and is now acting as such Substitute Committee; and that this is an action for construction of certain portions of the Will of Miriam D. Thropp, deceased, in regard to the proper distribution of certain income from the testamentary trust created by such Will; that service of process had not yet been effected against defendants in this action prior to the death of the said Karl J. Hardy, former Committee; and that said Roy B. Kelly has been properly authorized and directed by the said Circuit Court for Baltimore County, Maryland, to substitute himself as plaintiff in this action and to prosecute this action; and that the claim set forth in the complaint herein was not extinguished by the death of the said Karl J. Hardy.

WHEREFORE, the said Roy B. Kelly moves the Court for an order substituting him in his capacity as Substitute Committee of the Estate of Thomas A. Scott, Incompetent, as plaintiff in this action; and that the Court order the substitution of the said Roy B. Kelly as party plaintiff in this proceeding without the necessity of this Motion being served against all of the non-resident parties defendant who have not yet been served in this action.

/s/ Roy B. Kelly
Roy B. Kelly,
Substitute Committee for
the Estate of Thomas A.
Scott, Incompetent
714 Transportation Building
Washington, D. C.

/s/ F. Elwood Davis
F. Elwood Davis
714 Transportation Building
Washington, D. C.
Attorney for Roy B. Kelly,
Substitute Committee for the
Estate of Thomas A. Scott, Incompetent

Filed Nov 16 1951 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roy B. Kelly, Substitute Committee of the Person and Estate of Thomas A. Scott, Incompetent,
Plaintiff,

vs.

Fidelity-Philadelphia Trust Co., et al
Defendants.

Civil Action No. 3541-50

Affidavit for Entry of Default by Clerk

District of Columbia: ss

F. Elwood Davis, being first duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that the complaint in this action was filed on the 15th day of August, 1950; that the defendants in the above entitled action are non-residents and were served by publication according to the rules of this Court; that he personally mailed a notice of publication to these absentee defendants and further informed them that if they failed to file their appearance within 40 days there would be entered a default against them; that service by publication on the defendants in the above entitled action is evidenced by an affidavit filed by affiant; that certain of the defendants have entered their appearance

and answered the complaint filed in the above entitled action as evidenced by the records of this Court; that the time within which defendants may answer or otherwise move as to the complaint has now expired; that the following named defendants, Douglas Scott Thropp, Jr., Wilmer Scott, and Miriam D. Utgoff, have not entered their appearance, answered, or otherwise pleaded; that the following named defendants, Miriam Scott Thropp and Douglas Scott Thropp, have entered their appearance, but have not answered or otherwise pleaded in the above entitled action; that affiant has not been served with any pleadings by the above named defendants; affiant further states that the time for the above named defendants to answer or otherwise move has not been extended; that none of the above named defendants are infants or incompetents.

/s/ F. Elwood Davis
F. Elwood Davis
Attorney for Roy B. Kelly,
Substitute Committee of the
Person and Estate of
Thomas A. Scott,
Incompetent

Subscribed and sworn to before me this 16th day of November, 1951.

/s/ Jane L. Meyer
Notary Public
My Com. expires April 30, 1955

Filed Jul 23 1953 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roy B. Kelly, Substitute Committee of the Estate of Thomas A. Scott, Incompetent,
Plaintiff,

vs.

Fidelity-Philadelphia Trust Company, et al
Defendant.

Civil Action No. 3541-50

Points and Authorities in Opposition to Appointment of a Guardian Ad Litem

1. Alexander Carter Thropp has no interest in the subject matter of this action and, therefore, there is no possibility that the interests of Alexander Carter Thropp could be adversely affected.

2. The appointment of a guardian ad litem would delay a matter which has been before this Court for approximately three years, has been pretried, and which otherwise would be disposed of by this Court at an early date. Accordingly, this Court should deny the motion in the exercise of its discretion in this matter.

Fed. R. Civ. Proc. Rule 17(c).

/s/ Cary McN. Euwer
Cary McN. Euwer
1625 K Street, N. W.
Washington, D. C.
Attorney for Plaintiff

Certificate of Service

I hereby certify that I have this 23rd day of July, 1953, served a copy of the foregoing Points and Authori-

ties in Opposition to Appointment of a Guardian Ad Litem on Edward Bennett Williams, Esq., 839 17th Street, N. W., Washington, D. C., Attorney for Defendant, Fidelity-Philadelphia Trust Company; Edgar A. Wren, Esq., Woodward Building, Washington, D. C., Attorney for Defendant Douglas Scott Thropp; J. Paull Marshall, Esq., 528 Union Trust Bldg., Washington, D. C., Attorney for Defendants Miriam Scott Thropp and Douglas Scott Thropp, Jr.; John Hold Myers, Esq., 817 Munsey Building, Washington 4, D. C., Attorney for Defendants, Henry W. Farnum, Anna M. F. Thompson, Charles I. Thompson, Jr., Joseph Whitaker Thompson, II, Henry Farnum Thompson, Elizabeth F. Gates, and Caleb Gates, III; and Arthur G. Lambert, Esq., Munsey Building, Washington 4, D. C., Guardian ad Litem and Attorney for Defendants, Edith B. Farnum, Anna S. Farnum, Henry W. Farnum, III, Betsy Anne Gates, Mary Ellen Gates, Gwynne Gates, by mailing a copy thereof, postage prepaid.

/s/ Cary McN. Euwer
Cary McN. Euwer

Filed Aug 6 1953 Harry M. Hull, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roy B. Kelly, Substitute Committee of the Estate of Thomas A. Scott, Incompetent,
Plaintiff

vs.

Fidelity-Philadelphia Trust Co., et al.,
Defendants

Civil Action No. 3541-50

Memorandum of Court

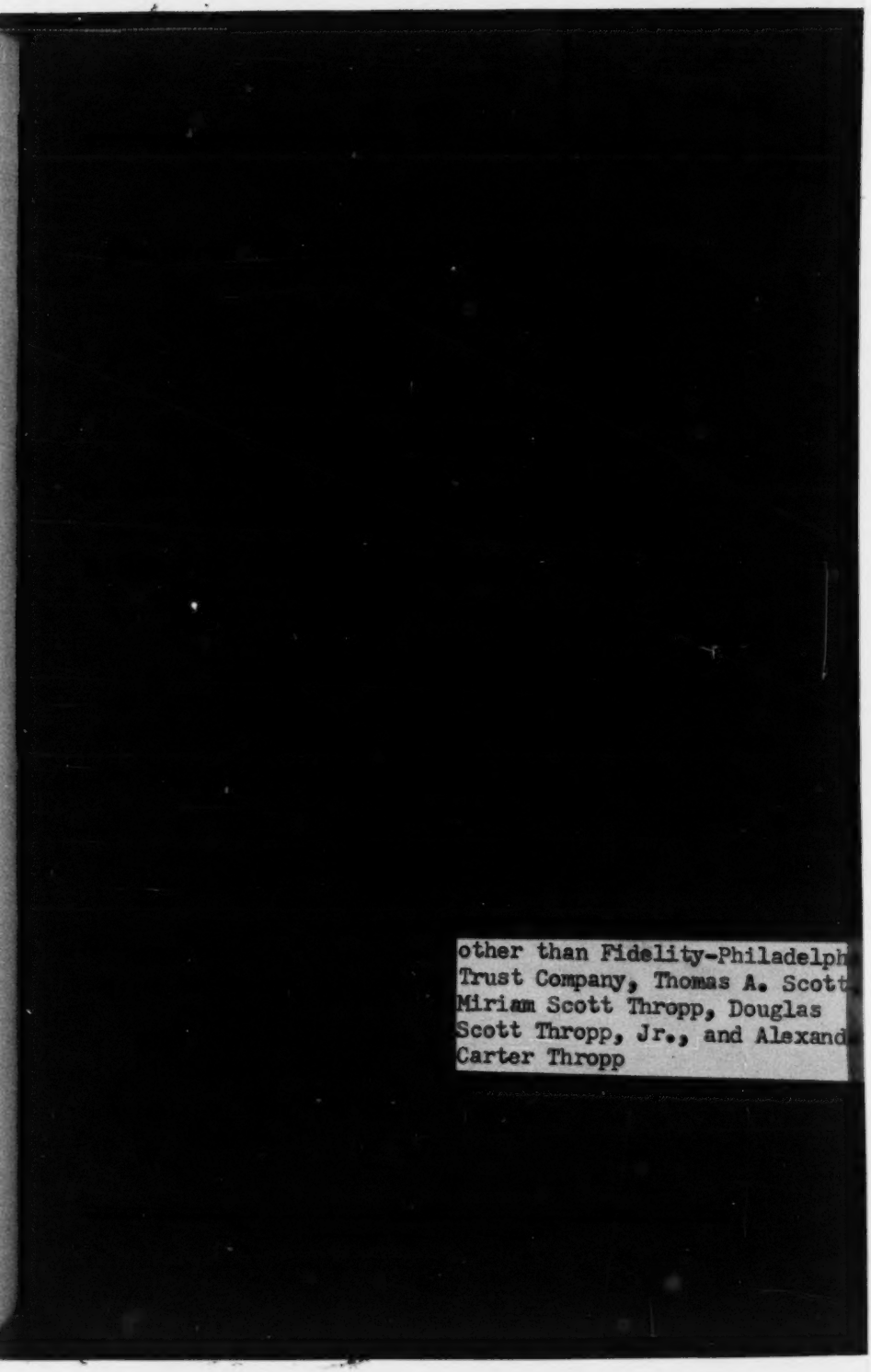
I think this case is one appropriate for the appointment of a guardian *ad litem*. In fact, I think the appointment of a guardian ad litem is necessary. The

guardian *ad litem,* when appointed, will be asked to file a report promptly, so that the hearing in this case will not be delayed.

The Court will sign an order appointing S. Churchill Elmore, Colorado Building, Washington, D. C., guardian *ad litem* for Alexander Carter Thropp.

/s/ Walter M. Bastian
Judge

August 6, 1953

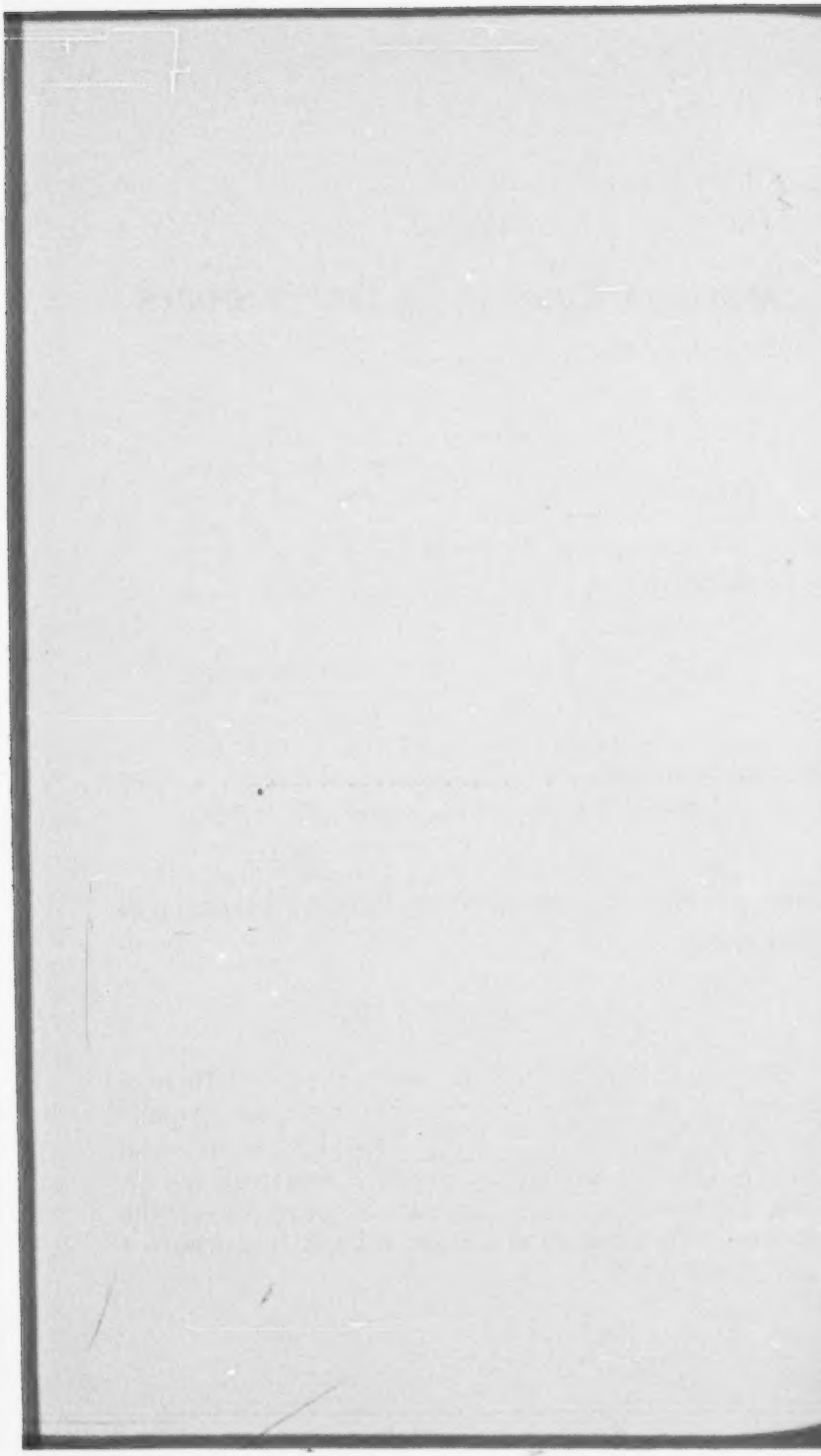

other than Fidelity-Philadelph
Trust Company, Thomas A. Scott
Miriam Scott Thropp, Douglas
Scott Thropp, Jr., and Alexand
Carter Thropp

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IN THE

Supreme Court of the United States

October Term, 1955

No. 495

DOUGLAS SCOTT THROPP, *Petitioner,*

v.

HENRY W. FARNUM, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum of the United States District Court for the District of Columbia is set out at page 48 of the Record; the Court's Findings of Fact and Conclusions of Law at pages 49 through 52 of the Record; the Court's Judgment at page 52 of the Record. The opinion of Court of Appeals is reported at 223 F. 2d 640.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 26, 1955 (R. 65). The petition for rehearing was denied on July 1, 1955 (R. 71). The time for filing of this petition for certiorari was extended to and including October 29, 1955, by Chief Justice Earl Warren on September 26, 1955 (App. 8A). The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did the Courts below lack jurisdiction because of non-joinder of persons whose interest in the controversy was not injured by its determination and who were fully represented by others similarly situated?

2. Is it appropriate at this time for Petitioner to seek certiorari on the basis of a suggestion that parties interested in the controversy may have been born since institution of the suit or during appellate proceedings?

3. Is it a ground for issuance of a writ of certiorari that the Court of Appeals relied in part upon the the principle that a will which is intended to dispose of the entire estate should be construed to avoid intestacy?

4. Were the courts below correct in holding that the phrase "time hereinafter fixed" as used in the instant will as the time of termination of the several income interests given to the issue of testatrix' children is the time for final distribution of principal?

STATUTES AND REGULATIONS INVOLVED

No statutes or regulations are specifically involved in this case.

STATEMENT OF THE CASE

The petition for a writ of certiorari presented here is filed by one of the two sons of Miriam D. Thropp, deceased, and seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit awarding one-fifth of the income of his mother's estate to the children of her deceased daughter.

This son, the Petitioner, is Douglas Scott Thropp. His brother, Thomas A. Scott (he no longer uses the name of Thropp) has an identical interest in regard to the estate and has participated in all the prior stages of this litigation but has not joined in the present petition. The deceased sister of Petitioner was Anna Scott Farnum and Respondents herein are Henry W. Farnum, one of her children, her other adult descendants and Arthur G. Lambert, guardian ad litem for minor descendants of Anna Scott Farnum.

It is believed that all persons who might possibly have an interest under the will were joined originally as defendants in the proceedings in the District Court, either in their own right or by guardian ad litem. Three years later, in March of 1953, a grandson of Petitioner was born for whom a guardian ad litem was appointed on Petitioner's motion. Petitioner now *suggests* the existence of grandchildren of his brother, Thomas A. Scott, for whom no guardian has been appointed. Neither their names nor dates of birth appear in his petition or in any other pleadings heretofore filed. Respondents have no knowledge of any such per-

sons. If they exist they were presumably born after July, 1953 since the petition filed at that time *by the present petitioner* for appointment of a guardian ad litem for his grandson indicates that all other then living great-grandchildren of the testatrix were represented by guardians ad litem at that time.

As to the merits of the controversy, the testatrix, Miriam D. Thropp, died on October 4, 1930, a resident of the District of Columbia, leaving a will dated July 2, 1927, and two codicils dated October 1, 1929 and June 27, 1929, respectively, all of which were duly admitted to probate on October 14, 1930. The codicils are not material to the case. The will created a trust of testatrix' residuary estate for the benefit of three of her children and their issue. She gave two-fifths of the income to each of her two sons and one-fifth to her daughter. On the death of any one of her children she gave "the share of income to which the child so dying would be entitled if living, to his or her issue until the time hereinafter fixed for the distribution of the principal of this trust, in equal shares."

Decedent's daughter has died. The two sons still live. The principal of the trust is distributable after their deaths, and none has been distributable to date. *The substantive question is whether the daughter's children are entitled to her one-fifth share of income.*

The problem of interpretation grows out of the following provisions affecting the residuary trust:

> "SIXTH: All the rest, residue and the remainder of my estate ... I give, devise and bequeath unto my Trustees, hereinafter named, In Trust. . . .
>
> "(e). To pay unto my sons Douglas Scott Thropp and T. A. Scott Thropp, and my daughter

Anna Scott Farnum, the balance of the net income in the following proportions during the full term of their respective natural lives:

"To each of my sons, Douglas Scott Thropp and T. A. Scott Thropp, two-fifths thereof; and to my daughter, Anna Scott Farnum, one-fifth thereof.

"Upon the decease of any one of my said children to continue to pay the share of income to which the child so dying would be entitled if living, to his or her issue until the time hereinafter fixed for the distribution of the principal of this trust, in equal shares.

"In the event that any one of my said children should die without leaving issue surviving, or if he or she should leave issue and such issue should die before the time fixed for the distribution of the principal of this trust, then any income to which he or she, or his or her issue, would be entitled if living shall be paid, in equal shares unto the survivors of my said children and their issue, per stirpes.

"(f) ... I direct that prior to the time for final distribution my residuary estate shall be partially distributed as follows:

"f-1. On the death of my son Douglas Scott Thropp, any of his children that shall have attained the age of thirty years shall thereupon be entitled to receive a proportionate part of One Hundred and Fifty Thousand Dollars ($150,000) of the principal of this trust; and thereafter as and when each child of my said son, Douglas Scott Thropp attains the age of thirty years, he or she shall thereupon become entitled to receive, and there shall likewise be paid over to him or her his or her share of One Hundred and Fifty Thousand Dollars ($150,000) of the principal of this trust fund, share and share alike.

"f-2. [Same provision as f-1 for children of Thomas A. Scott Thropp].

"f-3. On the death of my daughter Anna Scott Farnum, any of her children as shall have attained the age of thirty years shall be thereupon entitled to receive a proportionate part of one-third of the balance of the principal of residuary estate remaining after deducting from the whole principal the Three Hundred Thousand Dollars ($300,000) as hereinbefore provided; and thereafter as and when each child of my said Daughter Anna Scott Farnum attains the age of thirty years he or she shall thereupon become entitled to receive, and there shall likewise be paid over to him or her his or her share of one-third of such balance of this trust, share and share alike.

"f-4. In addition to the One Hundred and Fifty Thousand Dollars ($150,000) provided for in sub-division 'f-1' of this item of my Will, and the One Hundred and Fifty Thousand Dollars ($150,000) provided for in sub-division 'f-2' of this item of my Will, the children of my sons Douglas Scott Thropp and T. A. Scott Thropp shall also participate, in the proportion and at the times in said sub-division 'f-1' and 'f-2' provided, in the remaining two-thirds of the balance of this trust after deducting from the whole principal the two sums of One Hundred and Fifty Thousand Dollars ($150,000) each as hereinbefore provided.

"f-5. At the expiration of twenty-one years from the date of the death of the survivor of my said children, Douglas Scott Thropp and T. A. Scott and Anna Scott Farnum, this trust shall be terminated, and the principal thereof then held by my Trustees shall be distributed, per stirpes, among any of my grandchildren (children of my said sons Douglas Scott Thropp and T. A. Scott Thropp and Anna Scott Farnum) then living who shall not have attained the age of thirty years

and the living issue of any of my said grandchildren who shall have died before attaining the age of thirty years, leaving issue, in the proportions hereinbefore in this sub-division 'f' of my Will provided."

Testatrix' daughter Anna Scott Farnum, died May 25, 1940, survived by her three children, Henry W. Farnum, Elizabeth F. Gates and Anna M. F. Thompson, appellees herein, all of whom had then reached age thirty. At the death of Mrs. Farnum the principal of the trust was substantially less than $300,000. Accordingly, no distribution of principal was made to her issue. Testatrix' other two children, Douglas Scott Thropp and Thomas A. Scott still live.

The issue is whether the one-fifth share of income given by clause *e* of the will to Anna Scott Farnum and her issue "until the time hereinafter fixed for the distribution of the principal of this trust" is payable to her issue or whether this income interest ceased upon her death. This, in turn, requires a decision as to whether the distribution referred to is the final distribution or one of several earlier partial distributions for which the will provides. Respondents contend that it means the final distribution under clause *f*-5 and that meanwhile, regardless of what partial distributions of principal may take place, the income from whatever principal remains in trust is payable in a two-fifths share to each son of testatrix or his issue and in a one-fifth share to the issue of Anna Scott Farnum.

The District Court agreed with appellees' position saying:

"... the language 'distribution of the principal of this trust' means final distribution, subject only

to the contingency or contingencies that the residuary estate will be reduced by the payments provided in the applicable sub-divisions of paragraph 6(f)."

The same conclusion was reached by the Court of Appeals which affirmed the decison of the District Court.

ARGUMENT

1. Persons, whose interest in the controversy will not be injured by its determination and is fully represented by other parties of record are not indispensable and their nonjoinder does not deprive the Court of jurisdiction.

The Federal Courts have repeatedly defined an indispensable party as being one who has such an interest in the controversy or its subject matter that a final decree between the other parties cannot be made without seriously injuring his interest or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. *Jennings* v. *United States,* 264 Fed. 399, 404 (C.C.A. 8, 1920)

Petitioner asserts that the grandchildren of Thomas A. Scott and the issue of Helen Bickley Page are parties indispensable to this action and that failure to join them either in their own right or by a guardian deprives this Honorable Court and the courts below of jurisdiction.

The grandchildren of Thomas A. Scott have a possible, though remote, interest in the subject matter of this controversy. It is obvious, however, that their interest is identical to that of Petitioner's grandchild for whom a guardian ad litem was appointed in July 1953. At page 10 of his petition, Petitioner *himself*

asserts his inability to "imagine" any difference in the "status" of the two classes of grandchildren. It is submitted, therefore, that the interests of the grandchildren of Thomas A. Scott were in fact fully represented by the guardian of their cousins regardless of the fact that they were not technically made parties of record.

In *De Korwin* v. *First National Bank of Chicago,* 156 F. 2d 858 (C.C.A. 7, 1946), the court held that all heirs and distributees are not indispensable parties to a suit to construe a will where their interest would be the same as that of another party of record. See also *Atwood* v. *National Bank of Lima,* 115 F. 2d 861 (C.C.A. 6, 1940); 3 Moore's Federal Practice (2d Ed.), Paragraph 19.08, page 2158.

More important than representation of their interest by the guardian ad litem for the grandson of Petitioner is the fact that the final decree in this matter does not injure the interests of the grandchildren of Thomas A. Scott in any way. On the contrary the interpretation of the will adopted by the courts below is the only possible interpretation from which they can benefit. The present controversy does not involve the rights of remaindermen to receive principal or the time when principal shall be distributed. It involves only determination of the persons entitled to income pending distribution of principal at times and in proportions that are not in dispute. Under the view of both lower courts as well as of Respondents, the 40%, 40% and 20% division of income established by the will during the joint lifetimes of testatrix' three children will continue so long as any principal remains undistributed with the issue of each deceased child receiving the decedent's per-

centage. Thus it is possible that the grandchildren of Thomas A. Scott will receive some or all of his 40% share of income after his death. Petitioner, however, has contended that whenever principal becomes distributable to a particular family line the interest of that line in income must cease. This contention is favorable to Petitioner and to his brother because under it they would receive the 20% of income formerly paid to testatrix' deceased daughter but it cannot benefit the issue of either of them because by the same token as would cut off income to the daughter's descendants on her death, the share of income payable to either brother would not continue to be payable to his descendants when he dies. It follows that the grandchildren of Thomas A. Scott could not profit by any other decision than the one that has already been made below. Far from being "indispensable" because "injured", they have, in fact, been benefited.

Petitioner also asserts that the issue of Helen Bickley Page are indispensable parties to this action because they are the heirs at law of the testatrix and the question of partial or complete intestacy is involved. Helen Bickley Page and her issue were expressly disinherited by the will of Miriam D. Thropp. The instant action was instituted to seek a judicial construction of certain other provisions of that will. In the course of the trial and determination, the question of intestacy arose only by inference, the court noting, as quoted by the Petitioner, that if a judicial interpretation was not made, an intestacy would result. This is true in substantially every litigation involving construction or interpretation of a will, yet it cannot be argued that all such cases involve an

intestacy and that, therefore, all heirs at law are indispensable parties. It is submitted that the issue of Helen Bickley Page have no interest in the subject matter of this controversy, let alone such an interest as will be seriously injured by its determination.

2. Petitioner may not now raise the question of non-joinder of indispensable parties.

Assuming, arguendo, that there are grandchildren of Thomas A. Scott in existence who are indispensable parties to this action, it appears that (1) such grandchildren were born after the action was instituted, and (2) the birth was particularly within the knowledge of Petitioner who took no steps to correct the record defect. Certainly it was not respondent's duty to correct this technical defect when to this day respondents have no record knowledge of the birth of any such grandchildren. Petitioner's brother, Thomas A. Scott, is an adjudicated incompetent. It would not stretch the ordinary concept of brotherhood to expect a brother, under such circumstances morally, if not legally, to attend to the wants and interests of his unfortunate brother and his family. Certainly the relationship would require the competent brother to advise the court promptly of the birth of a grandchild to his brother when the birth occurred during the course of litigation involving the interests of two brothers and their issue. This is especially true when it is remembered that the Petitioner himself moved for the appointment of a guardian ad litem when his own grandchild was born after the commencement of the action. It is submitted that Petitioner's failure to do so was not the result of dereliction of his fraternal duty, but was in fact the result of a determination that the interests of the afterborn child

were already more than adequately represented in the litigation. Petitioner cannot now be heard to raise this defect for the purpose of obtaining judicial reconsideration of the merits of the controversy.

3. The will was drawn to meet an unusual situation and should be construed according to its exact terms which require that income be paid to all family lines until final distribution of principal.

Petitioner has suggested that "the court below erred in basing its decision upon the concept of partial intestacy." Even if so, this would not appear to be a ground for granting a writ of certiorari. Cf. Rule 38. However, it is far from the case. The decision of the Court of Appeals was a decision construing the will of Miriam D. Thropp and "partial intestacy" was in no way involved except by reference to the familiar principle that when a will obviously seeks to dispose of the entire estate a construction of it should be sought which "frowns upon intestacy." This canon of construction is peculiarly apt in this case where paragraph NINTH of the will expressly disinherits testatrix' daughter, Helen Bickley Page, and her issue.

What the Court of Appeals, as well as the District Court, *did* do was to construe the will to determine the meaning it was intended to express. In spite of its length, the basic plan of the will is not complicated and its interpretation is not difficult if it is read exactly as it is written without assuming any intention by testatrix to conform to more common testamentary schemes. The crucial words are found in clause *e* where testatrix directs that income be paid to her children for life and then to their respective issue "until the *time* hereinafter fixed for the distribution of the principal of this trust" [emphasis added]. The will then

goes on in clause *f* to distinguish between "the time for final distribution" (the time, as held below, when the income estates terminate) and various other times at which "my residuary estate shall be partially distributed." If this distinction is observed it will be found that the will follows a logical pattern and is fully self-contained. However, if the distinction is *not* observed and the time for final distribution when the gifts of income cease is confused with the various events causing partial distribution, it will be found that the will not only requires judicial construction but must be amplified by judicial interlineation.

Mrs. Thropp's will was not cast in the usual mold to meet the usual family situation. To say the least the situation in her family was quite unusual. The full details do not appear, but the general outlines can be gathered from items SEVENTH and EIGHTH of the will which indicate that testatrix' two sons were creditors of their father in substantial amounts and that they had a "supposed claim" against the testatrix resulting from a bond issue by their father. Apparently these family claims had been taken to court since the first sentence of item EIGHTH refers to a desire by testatrix "to put an end to all litigation among the members of my family." To accomplish this she provided that the sons would forfeit their interests in her estate if they did not surrender their claims within six months of her death.

Item SEVENTH also bears upon the point now at issue since testatrix states therein that she has always intended to reimburse her sons for encumbering their remainder interests in another estate to the extent of $150,000 each for their father's benefit.

The process by which testatrix proceeded from these considerations to the formulation of the plan of her residuary trust is not set forth and, indeed, is not important. The point is simply that she was dealing with a confused, difficult and somewhat uncommon situation. It is to be expected that the solution she chose was different from the usual testamentary arrangement and the clear meaning of her words should not be distorted by forcing them to conform to a more common pattern.

Mrs. Thropp's solution to her problem was to repay whatever obligation she felt was owing to her sons by means of a payment to their issue. Thus, it is not until after their respective deaths that the $150,000 preferences in remainder in favor of their issue will become operative. She also favored her sons and their issue over their sister or her issue by giving each son two-fifths of the income while giving only one-fifth to her daughter. The point in dispute is when this gift of income should cease—at the time when the estate is finally distributed or at some one of the earlier times of partial distribution. It is submitted that the will cannot, without distortion, be read to provide that this gift ceases at any time except the time of final distribution.

Clause *e* which contains the gift of income not only provides for income to be paid to the three children but also directs the trustees:

> "Upon the decease of any one of my said children to continue to pay the share of income to which the child so dying would be entitled if living, to his or her issue until the *time* [not times] hereinafter fixed for the distribution of the *principal of this trust* [i.e., the whole trust not just a share of it] in equal shares." (emphasis supplied)

The word "time" is singular as, indeed, it should be if the time of final distribution is intended. If a time of partial distribution had been intended, testatrix would either have used the plural "times" or, to express more exactly what she might have intended, would have said at "the time hereinafter fixed for distribution *of each such issue's share* of the principal of this trust." The will contained neither of these possible additions and there would seem to be no reason to insert them other than a desire to make it correspond to the more common ideas of other testators.

In addition to the reluctance that courts have always shown when asked to add judicial interlineations to a will, it will be observed that if testatrix' will is amplified as suggested above, other problems are thereby created. The first of these is that if the share of income given to a child ceases at the child's death the gift of income to his or her issue is largely meaningless since at that time principal is paid out to all the child's children who have reached age thirty. This argument cannot be answered by saying that the gift of income to issue is intended to have meaning only if children of the deceased child have not reached age thirty since the gift of income after the death of a child is a gift to that child's "issue", a term embracing all lineal descendants, however remote, while the only partial distributions to be made as a result of the child's death are to his or her "children" who have then reached age thirty or who thereafter reach that age.

A further problem to interpretation of the will to require termination of a share of income given to a child at the child's death is that in clause *e* income is given two-fifths to each son and one-fifth to Mrs. Far-

num. There is no other gift of income provided on the death of one or more of the children, the will simply providing that each child's issue shall receive "the share of income to which the child so dying would be entitled if living." No event which would change these proportions of income is contemplated by the will other than a death of a child *without* issue, which, of course, has not happened. Thus it seems clear that the one-fifth share of income formerly paid to Mrs. Farnum must now be payable to her issue.

The alternative that has been contended for by Petitioner to avoid this result requires construing the gift of "two-fifths" of income as meaning "two-fifths *or, after my daughter's interest ceases, one-half.*" There is no justification for grafting such a major addition onto the will when the language used by testatrix can easily be given its clear meaning. Nor is any such addition (or any other change in the language of the will) required unless the obvious meaning, already approved by two courts, of the "time hereinafter fixed for the distribution of the principal of this trust" is distorted to mean the several times fixed for *partial* distribution.

4. The court below held correctly that income should continue to be distributed in the proportions established by testatrix so long as any principal remained undistributed.

The Court of Appeals held:

> "... the percentage of income paid to Anna [Farnum] during her life is continued after her death for her issue, but the percentage will not apply to principal which from time to time is distributed; that is to say, at the several times when distribution of principal occurs the amount of the one-fifth income will be reduced by application

thereafter of the percentage only to the principal remaining in the trust."

Thus unless the principal should all be distributed at the times of partial distribution set forth in paragraphs f-1 through f-4 the several income interests will not finally end until the time when "this trust shall be terminated" under clause f-5. Petitioner attempts to discredit this decision by arguing that clause f-5 is simply designed to comply with the Rule against Perpetuities and therefore could not have been intended as the ultimate "time hereinafter fixed" when the several income interests should end. His contention must fail for several reasons. In the first place the clause imposes a limitation well inside the boundaries of that rule. As Petitioner himself mentions there were a number of grandchildren of testatrix living when she wrote her will yet clause f-5 provides for termination of the trust 21 years after the death of her *children*. Had this clause been aimed primarily at the Rule against Perpetuities she would surely have added her living grandchildren as measuring lives if not all of her issue who might survive her.

Moreover, as pointed out above, great-grandchildren of testatrix who may become entitled to principal by reason of the death of their parents before the death of one of testatrix' sons will not receive any principal until the time specified in clause f-5. Therefore, the clause cannot be dismissed merely as a "saving clause."

More important, however, Petitioner's argument begs the question which is whether the gifts of income are intended to be independent of the times for partial distribution. If they are, it does not matter whether

the final distribution of principal (which would necessarily end the income estates) is made because of expiration of the period stated in clause f-5 or because all her grandchildren survive their respective parents so that complete distribution could be made on the death of the last of her children without anything being held in further trust for great-grandchildren. When she gave the income formerly payable to a deceased child to that child's issue testatrix said it should continue "until the time hereinafter fixed for the distribution of the principal of this trust." She spoke of the whole principal, not just part of it, and her plain meaning is that income shall continue to be paid *in the proportions she had established* so long as any of "the principal of this trust" remains.

CONCLUSION

Rule 38 of the Supreme Court of the United States sets out certain guides to be followed in determining whether or not a petition for a writ of certiorari should be granted. Paraphrasing those guides, it is obvious that the instant petition presents no federal questions of substance, no instance of conflict between local or federal courts, no question of importance of local law and, of course, the case does not involve an interpretation of or rights accruing under the Constitution of the United States. It is respectfully submitted that the instand petition reveals no record or legal defect in

the proceedings below and that in the absence of any of the above named criteria, the petition should be denied.

Respectfully submitted,

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